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No. 07-451

FILED

NOV 13 2007

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION; CAMBRIDGE PRODUCERS, LTD.; and THOMAS R. CAMBRIDGE,

Petitioners,

v.

OKLAHOMA TAX COMMISSION; and THOMAS E. KELP, JR., JERRY B. JOHNSTON, and CONSTANCE IRBY, tax commissioners, all in their official capacities,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

The argument proffered by the Oklahoma Tax Commission ("OTC") in its Brief in Opposition rests on four primary assumptions, none of which is valid.

I. A TAX SCHEME THAT IS "REASONABLY COMMONPLACE AROUND THE COUNTRY" IS NOT, WITHOUT MORE, CONSTITUTIONAL.

The OTC contends that the challenged sections of the Oklahoma tax code, specifically 68 Okla. Stat. Ann. §§ 2385.1-2385.28, are constitutional because similar schemes are "reasonably commonplace around the country".[1] Br. in Opp. 4. The OTC then comments that the "paucity of cases" in which such "commonplace" tax schemes have been challenged is evidence that they conform to the Constitution. *Id.*

This Court regularly strikes down practices that have become "reasonably commonplace" around the country. In *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 486, 495 (1954), this Court unanimously struck down the "separate but equal" doctrine as contrary to the Equal Protection Clause notwithstanding that its use had become commonplace in school districts in states as geographically

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[1] In addition to those sections discussed in the Brief in Opposition, 68 Okla. Stat. Ann. § 2368(A) and § 2369 are also relevant to the Oklahoma tax withholding scheme.

and demographically diverse as Kansas, South Carolina, Virginia, and Delaware. More recently, in *Granholm v. Heald*, 544 U.S. 460 (2005), this Court held that bans on interstate, direct-to-consumer shipments of wine, which existed in nearly half of the States, were unconstitutional. *Id.* at 467-68, 493.

Ever since *Marbury v. Madison*, it has been the province of this Court to "say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803); *see also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (establishing this Court's power to review state court decisions). It is the duty of this Court to interpret the Constitution irrespective of popular support for or public attitudes regarding "reasonably commonplace" state statutes. *See, e.g., Chambers v. State of Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."); *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (describing the "countermajoritarian implications of judicial review" as "the protection [of] constitutional rights and liberties of individual citizens and minority groups. . . . ")). The OTC fails to acknowledge that the "commonplace" nature of a certain type of tax scheme does not render it constitutional if it does not, in fact, conform to the Constitution. It is precisely because such discriminatory, and hence unconstitutional, tax schemes are so

"commonplace" that this Court should grant *certiorari*.

II. WHETHER A WITHHOLDING STATUTE DEPRIVES NONRESIDENTS OF THE TIME VALUE OF MONEY WAS NOT ADDRESSED IN *TRAVIS*.

The OTC contends that "the practice of withholding from nonresident taxpayers" was resolved by this Court in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). Br. in Opp. 4-5. To the contrary, the *Travis* Court resolved the issue of whether withholding income taxes only from those upon whom "the state imposes no personal liability" in a manner that does not "in any wise increase the burden of the tax upon nonresidents" violates the Privileges and Immunities Clause of Article IV, § 2 of the U.S. Constitution. *Id.* at 76.

In *Travis*, a Connecticut company doing business in New York sued the comptroller of the State of New York alleging, *inter alia*, that a New York statute that required income tax withholding only of nonresidents violated the Privileges and Immunities Clause. *Id.* at 72-74. The company was particularly concerned that it would be compelled to withhold income otherwise payable to its employees who worked in New York, but who lived elsewhere, thereby subjecting the company to employee actions for reimbursement of the withheld money. *Id.* at 75. This Court ultimately upheld the constitutionality of such a withholding statute. *Id.* at 76.

The withholding statutes in Oklahoma, however, differs materially from the withholding statute in *Travis*. First, unlike the withholding statute in *Travis*, there is evidence that the Oklahoma tax scheme "increase[s] the burden of the tax upon nonresidents." Pet. 11-19 (discussing how the withholding tax deprives nonresidents of the time value of money).[2] Indeed, in *Travis*, there is no evidence that the time value of money was ever considered or even raised as an issue. Thus, *Travis* cannot be binding precedent on this issue. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.") (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5 (1974); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *United States v. More*, 7 U.S. (3 Cranch) 159 (1805) (Marshall, C. J.)).

Secondly, unlike the situation in *Travis*, Oklahoma does have "personal jurisdiction to assess and collect a tax" on a nonresidents' oil and gas royalty interest income "that is attributable to property within Oklahoma." *In re Income Tax Protest of Alani*, 2006 OK CIV APP 54, 135 P.3d 828, 833 (Okla. Civ. App. 2005).

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[2] The OTC, in its Brief in Opposition, did not contest that, because of the Oklahoma tax withholding scheme, nonresidents would suffer the deprivation of the time value of money.

Because the Court in *Travis* never addressed – much less resolved – the issue of whether a state withholding statute may deprive only nonresidents of the time value of money when a state has personal jurisdiction over certain income, the OTC's assumption that *Travis* resolves the issue here is unfounded. As a result, this Court should grant *certiorari* to determine the constitutionality of Oklahoma's discriminatory tax scheme.

III. THE DISCRIMINATORY BURDENS ON NONRESIDENTS ARE SUBSTANTIVE.

This Court has held that "where the question is whether a state taxing law contravenes rights secured by [the Privileges and Immunities Clause], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998).

Thus, in accordance with the Privileges and Immunities Clause, a nonresident may be compelled only "to pay taxes not more onerous in effect than those imposed under like circumstances upon the citizens of the . . . State." *Id.* at 297 (quoting *Shaffer v. Carter*, 252 U.S. 37, 56 (1920)).

Both the Oklahoma Court of Civil Appeals and the OTC wrongly conclude that "the difference in treatment is only in the means of collecting the tax." Br. in Opp. 6; *see also* App. 18-21. In fact, the Oklahoma tax

scheme substantively burdens nonresidents, and effects a "more onerous" burden upon nonresidents in two distinct ways.

First, nonresidents are substantively deprived of the time value of money as a direct result of the Oklahoma tax scheme, Pet. 11-18, a fact the OTC does not contest in its Brief in Opposition. Second, the Oklahoma tax scheme effects a "more onerous" burden on nonresidents by requiring them to file income tax returns to recoup their withheld monies. Pet. 17-19. This burden likely deters some from filing for a refund, thereby enriching the state's coffers with unclaimed refunds. Pet. 18.

These burdens are not derived merely from the "form, construction, or definition" of the Oklahoma tax scheme; instead, the scheme has the "practical operation and effect" of creating a "more onerous" burden on nonresidents. Thus, because the Oklahoma decision conflicts with this Court's decision in *Lunding*, this Court should grant *certiorari*.

IV. THE OKLAHOMA TAX SCHEME IS NOT CONSTITUTIONAL SIMPLY BECAUSE IT IS MORE "CONVENIENT" FOR OKLAHOMA.

The OTC, in the penultimate paragraph of its Brief in Opposition, concludes, based on *dicta* in *Travis*, that the "adoption of a withholding requirement for nonresident royalty owners is justified by the fact that collection of the tax from nonresidents is more difficult than collecting tax from residents."

Br. in Opp. 7. Assuming, *arguendo*, that this unsubstantiated allegation is true, it is not a basis for upholding the constitutionality of the tax scheme. In *I.N.S. v. Chadha*, which, incidentally, was decided more than sixty years after *Travis*, this Court held, "that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 462 U.S. 919, 944 (1983). Having already established that the Oklahoma tax scheme violates the Privileges and Immunities Clause, that it may be "more difficult" for Oklahoma to collect taxes from nonresidents is of no consequence.

CONCLUSION

Petitioners respectfully request that the Petition be granted.

Respectfully submitted:

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